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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MARY FRUDDEN, et al.

Case No. 3:11-cv-00474-RCJ-VPC

Plaintiffs,


v.

**PLAINTIFFS' OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS PLAINTIFFS' FIRST
AMENDED COMPLAINT**

KAYANN PILLING, et al.

Plaintiffs, MARY FRUDDEN and JON E. FRUDDEN, individually and as parents and guardians of their minor children JOHN and JANE DOE, hereby file their Opposition to Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint. This Opposition is made and based upon the Memorandum of Points and Authorities attached hereto, the documents on file herein, and any other matter the Court deems necessary and pertinent to this Opposition.

DATED: November 23, 2011.

By: 
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On Behalf of Themselves and their Minor Children

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Nearly 70 years ago, our United States Supreme Court wrote:

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity.

As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds.

We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of

1 opinion or force citizens to confess by word or act their faith
2 therein. If there are any circumstances which permit an exception,
they do not now occur to us. [n.]

3 We think the action of the local authorities in compelling the
4 flag salute and pledge transcends constitutional limitations on their
5 power and invades the sphere of intellect and spirit which it is the
purpose of the First Amendment to our Constitution to reserve
from all official control.

6 *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 640-42, 63 S.Ct. 1178 (1943)

7 **II. STANDARD**

8 The Federal Rules of Civil Procedure embrace a notice-pleading standard. Pleadings must
9 be construed so as to do justice. Fed.R.Civ.P. 8(e). All that is required to survive a Rule
10 12(b)(6) motion is “a short and plain statement of the claim showing that the pleader is entitled to
11 relief,” Fed.R.Civ.P. 8(a)(2), in order to ““give the defendant fair notice of what the ... claim is
12 and the grounds upon which it rests.”” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127
13 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2
14 L.Ed.2d 80 (1957)). In pleading the grounds of the claim, the plaintiff need not provide “detailed
15 factual allegations,” *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955; however, the plaintiff must plead
16 enough facts “to raise a right to relief above the speculative level.” *Id.*

17 To survive a motion to dismiss, a complaint must contain sufficient factual matter, which,
18 if accepted as true and construed in the light most favorable to Plaintiff, states a claim to relief
19 that is “plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009).
20 Facial plausibility exists if the pleader pleads factual content that allows the court to draw the
21 reasonable inference that the defendant is liable for the misconduct alleged. *Id.*

22 Plaintiffs’ First Amended Complaint (FAC) provides sufficient, specific facts regarding
23 Defendants’ conduct which gives rise to Plaintiffs’ claims, which if taken as true, would allow the
24 Court to draw a reasonable inference the Defendants are liable for the misconduct.

25 **II. ANALYSIS**

26 **A. FIRST CLAIM FOR RELIEF**

27 Plaintiffs’ First Claim asserts Defendants acted outside the scope of their authority and
28 thus their action is void. FAC, ¶139. Defendants argue Plaintiffs’ First Claim for Relief is not a

1 legally cognizable claim, but rather it is "merely a component of one of the myriad tests that the
2 courts have fashioned over the years in First Amendment jurisprudence." Motion, 5:13-14.
3 Defendants are entirely incorrect in their contention.

4 A claim for relief based upon *ultra vires* acts by government officials is widely recognized
5 by both federal and state courts. "Generally, judicial relief is available to one who has been
6 injured by an act of a government official which is in excess of his express or implied powers."
7 *Harmon, III v. Brucker*, 355 U.S. 579, 78 S.Ct. 433 (1958).¹

8 The law is well settled that where a statute is enacted to effect a
9 certain major purpose of public interest within the general control
10 of a particular public official or Department of Government and
11 such statute authorizes such official to make rules and regulations
12 to aid in carrying out the purposes of the statute, that such rules
and regulations to be valid must be in accordance with the
provisions of the statute, subordinate to its provisions and not in
conflict therewith.
United States v. Achabal, 34 F.Supp. 1, 3 (D. Nev., 1940).

13 Case law makes clear the Court can determine whether Defendants exceeded statutory
14 authority in promulgating the Written Uniform Policy and can enjoin Defendants from acts that
15 are unlawful or in excess of their authority. Plaintiffs' First Claim for Relief sets forth the
16 necessary allegations.

17 Although the Nevada Legislature has made clear maintaining control of education is
18 essentially a matter for local control by local school districts, this is not unlimited power or
19 authority. NRS 385.005. Rather, a school district's inherent right to prescribe and control

20
21 ¹See also *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208, 109 S.Ct. 468,
102 L.Ed.2d 493 (1988)("It is axiomatic that an administrative agency's power to promulgate
22 legislative regulations is limited to the authority delegated by Congress."); *Coyt v. Holder*, 593
F.3d 902 (9th Cir. 2010)(determining whether the Attorney General exceeded statutory authority
23 in promulgating an immigration regulation); *Associated General Contractors of California v. San
Francisco Unified School Dist.*, 616 F.2d 1381, 1384 (9th Cir. 1980)(upholding District Court's
24 determination that San Francisco Board of Education's affirmative action policy was void because
Board had no authority to adopt it); *Sagamore Park v. City of Indianapolis*, 885 F.Supp. 1146
25 (S.D. Ind., 1994)(Under authority of the Declaratory Judgment Act, 28 U.S.C. §2201,
26 moratorium held void on pendent state grounds because action was *ultra vires* where zoning
bodies in Indiana are not empowered by state law to enact such moratoria); *Horne v. City of
Mesquite*, 120 Nev. 700, 100 P.3d 168 (2004)(holding that two initiative ordinances were in
27 conflict with Nevada law and therefore invalid and unenforceable and thus declining to address
28 the claim that both ordinances violate the Nevada and United States Constitutions).

1 conduct in the schools is limited by other specific provisions of law. *Id.* The rights and powers
 2 granted to school districts' boards of trustees have been limited by other specific provisions of
 3 applicable law which, in this case, were entirely disregarded and render the Written Uniform
 4 Policy void *ab initio*.

5 First, NRS 386.350 leaves no doubt that the board of trustees may not enforce a policy or
 6 rule that is inconsistent with the Constitution or the laws of the State of Nevada. *Clark County*
 7 *School Dist. v. Beebe*, 533 P.2d 161, 91 Nev. 165 (Nev., 1975). In this case, Plaintiffs have set
 8 forth allegations which, if taken as true, establish the Written Uniform Policy to be unconstitu-
 9 tional and in violation of the Nevada Revised Statutes. A mandatory uniform policy which
 10 violates the Constitution and the laws of the State of Nevada is void and cannot be enforced.

11 Second, pursuant to NRS 386.365, except where the board finds that an emergency exists,
 12 each board of trustees in any county having a population of 100,000 or more, shall give 15 days'
 13 notice of its intention to adopt, repeal or amend a policy or regulation of the board concerning
 14 pupil discipline. The notice ***must include the terms of each proposed policy or regulation, or***
 15 ***change in a policy or regulation; interested parties must be afforded a reasonable opportunity***
 16 ***to submit data, views or arguments, orally or in writing*** and the board of trustees ***shall consider***
 17 ***all written and oral submissions respecting the proposal or change before taking final action.***

18 NRS 386.365. Plaintiffs allege there was no compliance with NRS 386.365 prior to promulgating
 19 the Written Uniform Policy at Roy Gomm and the mandates of NRS 386.385 have been
 20 circumvented. FAC, ¶¶ 56, 58, 61, 63, 64; 19:25-20:20. The discretionary function exception
 21 will not apply when a statute, regulation, or policy specifically prescribes a course of action for an
 22 employee to follow. The statutory directive must be adhered. *Berkovitz v. United States*, 486
 23 U.S. 531, 108 S.Ct. 1954, 100 L.Ed.2d 531, 536 (1988).

24 Third, NRS 388.070 requires the boards of trustees to maintain all the schools established
 25 by them as far as practicable, ***with equal rights and privileges***. Again, the facts alleged by
 26 Plaintiffs shows this has not been done. FAC, ¶¶ 228-233. Because the Written Uniform Policy is
 27 inconsistent with NRS 388.070, it is without authority and void.

28 Fourth, although NRS 392.458 permits the board of trustees to establish a policy that

1 requires students to wear school uniforms where certain prerequisites are met, there has been no
 2 compliance with the mandates of that statute. Neither the board of trustees nor the
 3 administrators, principals, teachers and other licensed personnel employed by them established the
 4 mandatory uniform policy at Roy Gomm pursuant to NRS 392.458. Rather, contrary to the
 5 express statutory language, the mandatory school uniform policy at Roy Gomm was established
 6 by the PFA and Uniform Committee utilizing arbitrary and capricious methods, lacking in
 7 adequate safeguards. FAC, ¶¶38, 39, 48, 49, 51-55, 67, 69, 80, 81, 129, 235 and 302.

8 Plaintiffs acknowledge *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673 [*reh'g*
 9 *denied*, 393 U.S. 900] (1968) identifies a four-prong test, the first of which is to determine
 10 whether the regulation is within the government's *constitutional* power to enact. Thus, the first
 11 prong of the *O'Brien* test depends necessarily on the powers granted to the government by the
 12 state's Constitution.² While such a determination must be made under an *O'Brien* analysis when
 13 determining whether a regulation is constitutional, that is far different from determining, as
 14 Plaintiffs claim herein, that the Defendants were without statutory power to implement mandatory
 15 uniforms and to promulgate the Written Uniform Policy, even assuming *arguendo* there is
 16 constitutional power to enact.

17 The validity and enforceability of the Written Uniform Policy as outside the Defendants'
 18 statutory power to enact constitutes a separate, legally cognizable claim and Plaintiffs' First
 19 Amended Complaint sufficiently sets forth the necessary allegations to establish a claim regarding
 20 Defendants' lack of power to enact. Based upon the points and authorities set forth above and
 21 the allegations set forth in Plaintiffs' FAC, Defendants' Motion to Dismiss Plaintiffs' First Claim
 22

23 ²Article 11, Section 2 sets forth the Nevada legislature's constitutional powers as follows:
 24 Uniform system of common schools. The legislature shall provide
 25 for a uniform system of common schools, by which a school shall
 26 be established and maintained in each school district at least six
 27 months in every year, and any school district which shall allow
 28 instruction of a sectarian character therein may be deprived of its
 proportion of the interest of the public school fund during such
 neglect or infraction, and the legislature may pass such laws as will
 tend to secure a general attendance of the children in each school
 district upon said public schools.

1 for Relief should be denied.

2 **B. SECOND CLAIM FOR RELIEF**

3 Defendants move to dismiss Plaintiffs' Second Claim for Relief asserting Plaintiffs failed to
4 demonstrate the First Amendment is implicated. Motion, 8:6-21. Defendants' Motion in this
5 regard is without merit. Defendants' not only ignore fundamental principles well-settled by
6 binding precedent, but ignore allegations in Plaintiffs' Complaint, which, if taken as true as this
7 Court is bound to do at this stage, clearly and unequivocally set forth a claim for violation of the
8 Plaintiff students' First Amendment rights.

9 Plaintiffs' FAC sets forth allegations of content and viewpoint discrimination, both in what
10 Defendants prohibit and what they mandate. Thus, contrary to Defendants' position, this case is
11 not governed by *Jacobs v. Clark County School District*, 526 F.3d 419 (9th Cir. 2008) and the
12 mid-scrutiny level established in *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673
13 [*reh'g denied*, 393 U.S. 900] (1968). Rather, it is governed by the strict scrutiny found in *Tinker*
14 *v. Des Moines Independent Community School Dist.*, 383 U.S. 503, 89 S.Ct. 733 (1969)(black
15 armbands worn by students to protest war was "akin to pure speech") and *West Virginia State*
16 *Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178 (1943)(requirement that students
17 salute the Flag and recite the Pledge of Allegiance for the "purpose of teaching, fostering and
18 perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the
19 organization and machinery of the government" was compelled speech).

20 The First Amendment rights of students in public schools is clearly established—they do not
21 "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."
22 *Tinker*, 393 U.S. at 506, 89 S.Ct. at 736 (1969). Courts construe the First Amendment as applied
23 to public schools in a manner that attempts to strike a balance between the free speech rights of
24 students and the special need to maintain a safe, secure and effective learning environment. *See*,
25 *e.g.*, *Tinker*, 393 U.S. at 507, 89 S.Ct. 733 (balancing the need for "scrupulous protection of
26 Constitutional freedoms of the individual" against the need of schools to perform their proper
27 educational function). Students cannot be punished merely for expressing their personal views on
28 the school premises ... unless school authorities have reason to believe that such expression will

1 “substantially interfere with the work of the school or impinge upon the rights of other
 2 students.” *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266, 108 S.Ct. 562, 567, 98
 3 L.Ed.2d 592 (1988), quoting *Tinker*, 393 U.S. at 509, 512-13, 89 S.Ct. at 738, 739-40. This
 4 court has expressly recognized the need for such balance: “States have a compelling interest in
 5 their educational system, and a balance must be met between the First Amendment rights of
 6 students and preservation of the educational process.” *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981,
 7 988 (9th Cir.2001). “The First Amendment protects not only the expression of ideas through
 8 printed or spoken words, but also symbolic speech — nonverbal ‘activity . . . sufficiently imbued
 9 with elements of communication.’” *Roulette v. City of Seattle*, 97 F.3d 300, 302-03 (9th Cir.
 10 1996) quoting *Spence v. Washington*, 418 U.S. 405, 409, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974).

11 “In deciding whether particular conduct possesses sufficient communicative elements to
 12 bring the First Amendment into play, we [must] ask[] whether ‘[a]n intent to convey a
 13 particularized message was present, and [whether] the likelihood was great that the message
 14 would be understood by those who viewed it.’” *Texas v. Johnson*, 491 U.S. 397, 404 (1989),
 15 quoting *Spence*, 418 U.S. at 410-11. In assessing this, the Court does not, as Defendants
 16 suggest, view the message in a vacuum. Motion, 8:8-15. The Court must look to the “particular
 17 activity, combined with the factual context and environment in which it was undertaken.” *See*
 18 *Spence*, 418 U.S. at 409-10.

19 Plaintiffs’ FAC sets forth allegations which show: (1) Plaintiffs openly, verbally and in
 20 writing, protested the implementation of mandatory school uniforms at Roy Gomm beginning
 21 April 27, 2011 and continuing to date. FAC ¶ 58-60; (2) On June 2, 2011, Defendant Rauh
 22 personally met with Plaintiff Mary Frudden as well as Andrea Hughs-Baird and Leilani
 23 Schweitzer, two other Roy Gomm parents, wherein Defendant Rauh was advised of their
 24 grievances with the implementation of mandatory uniforms at Roy Gomm. FAC ¶¶ 91-94; (3) On
 25 June 6, 2011, Defendants Pilling, Rauh, Morisson and Hunsberger as well as the WCSD’s board
 26 of trustees received Plaintiffs’ 38-page written complaint of protest. FAC ¶¶ 95-98; (4) From
 27 August 29, 2011 to September 9, 2011, Plaintiff students wore non-uniform clothing to school.
 28 FAC ¶ 106; (5) On September 12 and 13, 2011, Plaintiff students wore clothing to school

1 displaying words and symbols of the American Youth Soccer Organization (“AYSO”), a
 2 nationally recognized youth organization. FAC ¶¶ 107, 123; (6) Plaintiff students were disciplined
 3 for wearing the AYSO uniforms and were compelled to change into the mandatory Roy Gomm
 4 school uniform although there was no substantial interruption with the school environment. FAC
 5 ¶¶ 110-125; (7) On September 14, 2011, John Doe wore the Roy Gomm uniform shirt inside out,
 6 was sent to Defendant Pilling’s office for failure to comply with the mandatory uniform policy and
 7 was requested to and did turn the uniform shirt right side out so that the logo and written words
 8 could be viewed. FAC ¶ 126.

9 Contrary to Defendants’ assertion, Plaintiffs’ FAC does not “admit” Plaintiffs wore the
 10 soccer uniform “*merely* because they fell within an ‘exemption’ to the policy.” Motion, 8:14-15;
 11 FAC ¶ 108-114. By consciously choosing the “uniform” of another “team”--AYSO--Plaintiff
 12 students were protesting the Written Uniform Policy and were saying, via the AYSO uniform,
 13 they did not want to be a part of the Roy Gomm One Team, One Community, a message, at the
 14 very least, “akin” to pure speech. In addition, Plaintiff students were proclaiming with pure
 15 speech their affiliation with the AYSO “team.” Likewise, by turning his Roy Gomm shirt inside-
 16 out, John Doe was saying with conduct akin to pure speech, that he did not want to be compelled
 17 to wear the message of “Roy Gomm One Team, One Community” and “Tomorrow’s Leaders.”
 18 Given these particular activities, combined with the factual context and environment in which it
 19 was undertaken, it is clear Plaintiff students were sending their *continued* message of protest and
 20 their outward support of, and affiliation with, another “team.”

21 Defendants also fail to recognize that the Written Uniform Policy is not content or
 22 viewpoint neutral. A statute regulating speech is content-neutral only if the state can justify it
 23 without reference either to the content of the speech it restricts or to the direct effect of that
 24 speech on listeners. *Lind v. Grimmer*, 30 F.3d 1115, 1117 (9th Cir. 1994), *cert. denied*, 513 U.S.
 25 1111, 115 S.Ct. 902 (1995). If the state’s justifications for the statute stem from the “direct
 26 communicative impact of the speech,” then the statute regulates speech on the basis of its content.
 27 *Id.*, 30 F.3d at 1118. “Viewpoint discrimination is . . . an egregious form of content
 28 discrimination,’ and occurs when ‘the specific motivating ideology or the opinion or perspective

1 of the speaker is the rationale for the restriction [on speech].” *Truth v. Kent School Dist.*, 542
 2 542 F.3d at 649-50 (9th Cir. 2008)(ellipsis in original), quoting *Rosenberger v. Rector & Visitors*
 3 *of the University of Virginia*, 515 U.S. 891, 829 (1995). A restriction on speech is unconstitu-
 4 tional if it is “an effort to suppress expression merely because public officials oppose the speaker’s
 5 view.” *Alpha Delta Chi-delta Chapter v. Reed*, No. 3:05-cv-02186-LAB-AJB, 9994-9995 (9th
 6 Cir. Aug. 2011), quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46
 7 (1983).

8 Given the express statement of purpose found in the Written Uniform Policy, it is apparent
 9 that it imposes burdens that are based on the content of speech and that are aimed at a particular
 10 viewpoint and content. “[T]he fundamental rule of protection under the First Amendment [is]
 11 that a speaker has the autonomy to choose the content of his own message.” *Hurley v. Irish-*
 12 *American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 573, 115 S.Ct. 2338
 13 (1995). Burdening the speech of some to increase the speech of others is a concept “wholly
 14 foreign to the First Amendment.” *Buckley v. Valeo*, 424 U. S. 1, 48-49 (1976). Mandating
 15 speech that a speaker would not otherwise make necessarily alters the content of the speech. *Riley*
 16 *v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 795, 108 S.Ct. 2667
 17 (1988).

18 Here, the uniform shirt is employed as a symbol of adherence to Roy Gomm school’s One
 19 Team, One Community and to accept and promote the message that Roy Gomm students are
 20 “Tomorrow’s Leaders.” Although Plaintiffs have no qualms with the Plaintiff students becoming
 21 “tomorrow’s leaders,” they do take offense that, under the circumstances giving rise to this case,
 22 the message carries with it the necessary implication that tomorrow’s leaders from Roy Gomm
 23 will gain such status by adhering to the same kind of invalid, illegal and unconstitutional methods
 24 employed by Defendants in implementing mandatory uniforms and in promulgating the Written
 25 Uniform Policy.

26 Like the students in *Barnette*, 319 U.S. 624, 633, 63 S.Ct. 1178 (1943), compelled
 27 adherence with the Written Uniform Policy “requires the individual to communicate by word and
 28 sign his acceptance of the political ideas it thus bespeaks. Objection to this form of

1 communication when coerced is an old one, well known to the framers of the Bill of
 2 Rights.[note]"

3 Plaintiffs' Second Claim for Relief sets forth clearly established rights under the First
 4 Amendment which have long been recognized by the United States Supreme Court. Defendants'
 5 Motion should be denied.

6 **C. THIRD CLAIM FOR RELIEF**

7 Defendants reliance on the rational basis test as set forth in *Littlefield v. Forney ISD*, 268
 8 F.3d 275 (5th Cir. 2001) for governing Plaintiff parents' rights, Motion, 9:17-22, is misplaced in
 9 light of recent Federal and state laws which now command effective, meaningful parental
 10 involvement.

11 Pursuant to the parental involvement policy of the No Child Left Behind Act of 2001, set
 12 forth at 20 U.S.C. §6318 and Nevada's express adoption of such policy, NRS 392.457 and
 13 392.4575, it can no longer be asserted that parental rights in the public schools are of any *less*
 14 *importance* than the public schools' interest in fostering education and safe environments. Rather,
 15 parents are to be treated as *partners*.

16 As stated in Section 6318(d), Shared Parental Involvement for High Academic Standards,:

17 As a component of the school-level parental involvement policy
 18 developed under subsection (b) of this section, each school served
 19 under this part shall jointly develop with parents for all
 20 children served under this part a school-parent compact that
 21 outlines how parents, the entire school staff, and students *will*
share the responsibility for improved student academic
achievement and the means by which the school and parents will
build and develop a partnership to help children achieve the
State's high standards. [Emphasis added].

22 It is clear that fostering meaningful parental involvement is now an overriding goal.

23 To ensure effective involvement of parents and to support a
 24 partnership among the school involved, parents, and the community
 25 to improve student academic achievement, each school and
 26 local educational agency assisted under this part . . . shall educate
 27 teachers, pupil services personnel, principals, and other staff, with
 28 the assistance of parents, in the value and utility of contributions of
 parents, and in how to reach out to, communicate with, *and work*
with parents as equal partners, implement and coordinate parent
 programs, and build ties between parents and the school. [Emphasis
 added].

1 20 U.S.C. 6318(e)(3).

2 Here the express, main “purpose” of the Roy Gomm School Uniform Policy “is to
3 establish a culture of ‘one team, one community’ at Roy Gomm Elementary School. As such,
4 uniforms serve to foster school spirit and unity, as well as a disciplined and safe learning
5 environment. Students will feel like they are part of a ‘team’ working toward the goal of
6 academic excellence.” FAC, ¶ 89. School spirit and unity are the main, expected benefits,
7 whereas a “disciplined and safe learning environment” is said to be only *indirectly* affected.

8 “The very purpose of the First Amendment is to foreclose public authority from assuming
9 a guardianship of the public mind through regulating the press, speech, and religion.” *Thomas v.*
10 *Collins*, 323 U.S. 516, 545, 65 S.Ct. 315, 329, 89 L.Ed. 430 (1945) (Jackson, J., concurring).
11 “To this end, the government, even with the purest of motives, may not substitute its judgment as
12 to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if
13 directed by the government.” *Riley v. National Federation of the Blind of North Carolina, Inc.*,
14 487 U.S. 781, 791, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). Plaintiff parents’ fundamental
15 rights and the liberty interests conferred by way of Federal and state laws and the WCSD rules,
16 regulations and policies can not be undermined by a policy which purpose is merely to “foster
17 school spirit and unity” through a culture of “one team, one community.” *Barnette*, 319 U.S. 624,
18 63 S.Ct. 1178 (1943). Plaintiffs have set forth allegations which are sufficient to withstand
19 Defendants’ Motion to Dismiss their Third Claim for Relief.

20 **D. FOURTH CLAIM FOR RELIEF**

21 Plaintiffs’ Fourth Claim for Relief is premised upon a violation of procedural and
22 substantive due process. Plaintiffs’ Fourth Claim sets forth allegations which establish a
23 deprivation of Plaintiffs’ protected liberty interests. Liberty interests “may arise from two
24 sources—the Due Process Clause itself and the laws of the States.” *Hewitt v. Helms*, 459 U.S.
25 460, 466, 103 S.Ct. at 868 (1983). A State creates a protected liberty interest by placing
26 substantive limitations on official discretion. *Olim v. Wakinekona*, 461 U.S. 238, 249, 103
27 S.Ct. 1741, 1747 (1983). A State may do this in a number of ways, however, the most common
28 manner in which a State creates a liberty interest is by establishing “substantive predicates” to

1 govern official decision-making, *Hewitt v. Helms*, 459 U.S., at 472, 103 S.Ct., at 871, and,
2 further, by mandating the outcome to be reached upon a finding that the relevant criteria have
3 been met. Plaintiffs assert state laws and WCSD rules, regulations and policies regarding student
4 dress and discipline have created such a liberty interest protected by the Due Process Clause.
5 Furthermore, Plaintiffs set forth sufficient allegations to show they were stripped not only of their
6 constitutional rights to free speech, free expression and right to parent, but of their liberty interest
7 too, by an unauthorized, invalid voting procedure which was completely void of any procedural
8 safeguards.

9 This is not like the facts in *Jacobs v. Clark County School District*, 526 F.3d 419 (9th Cir.
10 2008) at all. In *Jacobs*, the Clark County School District adopted a regulation which created a
11 standard dress code for all Clark County students and established a means by which individual
12 schools in the District could establish more stringent mandatory school uniform policies. The
13 regulation was adopted pursuant to the authority given under NRS 392.458. The school district
14 then failed to follow their own regulation by failing to conduct the parental survey, which the
15 students said deprived them of due process. *Id.* at 440. The Ninth Circuit confirmed that both
16 the statute and the regulation were constitutional and found that plaintiffs' due process was not
17 violated. *Id.* at 441.

18 In the present case, the PFA and the Uniform Committee established arbitrary and
19 capricious "voting" procedures had absolutely no safeguards. FAC, ¶ 67. Even assuming the
20 PFA and the Uniform Committee had the requisite *authority* (which Plaintiffs contend they do
21 not), it cannot be disputed that the lack of procedural safeguards so infected the voting process as
22 to render it a violation of due process which resulted in the loss of Plaintiffs' constitutionally
23 protected rights. This was not, as in *Jacobs*, the government's policymaking. The action here
24 was private entities acting under color of law to deprive Plaintiffs of their constitutional rights.

25 Plaintiffs' Fourth Claim for Relief also challenges the unfettered discretion granted in the
26 Written Uniform Policy. FAC, ¶ 191. Where government officials are endowed with unbridled
27 discretion to regulate in the First Amendment arena, the Supreme Court has consistently held that
28 legal provision subjecting the exercise of the Freedom of Expression to a prior granting of

1 permission that is "without narrow, objective, and definite standards to guide the licensing
2 authority, is unconstitutional." *See, e.g., City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S.
3 750, 757, 108 S.Ct. 2138 (1988); *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 151,
4 89 S.Ct. 935 .

5 Defendants' argument regarding damages is unavailing. Motion, 10:22-11:14. When a
6 plaintiff alleges violation of a constitutional right, the Supreme Court has held that, even if
7 compensatory damages are unavailable because the plaintiff has sustained no "actual injury" —
8 such as an economic loss, damage to his reputation, or emotional distress — nominal damages are
9 nonetheless available in order to "mak[e] the deprivation of such right[] actionable" and to
10 thereby acknowledge the "importance to organized society that [the] right[] be scrupulously
11 observed." *Carey v. Piphus*, 435 U.S. 247, 266, 98 S.Ct. 1042 (1978).

12 **E. FIFTH CLAIM FOR RELIEF**³

13 The School District's liability can be founded on its policy, including a policy of inaction,
14 or custom which led to Plaintiffs' constitutional deprivations.⁴ *City of Canton, Ohio v. Harris*,
15 489 U.S. 378, 385 (1989); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978); *Long v.*
16 *County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006). Furthermore, a choice among
17 alternatives by a municipal official with final decision-making authority may also serve as the basis
18 of municipal liability. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 482-83 (1986). The
19 Court should look to state law to determine, as a matter of law, the officials with final policy-
20 making authority. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124, 126 (1988); *See Jett v.*
21 *Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989), *superseded by statute on other grounds as*
22 *stated in, Fed'n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1205 (9th Cir.
23 1996). Finally, ratification of the decisions of a subordinate by an official with final decision-
24 making authority can also be a policy for purposes of municipal liability under § 1983. *See*

25
26 ³ The arguments set forth under Section II.E. are in response to the arguments made by
27 Defendants in their Motion at 5:24-6:25 and at 11:16-12:23.

28 ⁴The students' constitutional rights to free speech and free expression and Plaintiffs' parental rights are, as set forth above, sufficiently pleaded.

1 *Praprotnik*, 485 U.S. at 127.

2 There is no heightened pleading standard with respect to the “policy or custom”
 3 requirement of demonstrating municipal liability. *See Leatherman v. Tarrant County Narcotics*
 4 *Intelligence & Coordination Unit*, 507 U.S. 163, 167-68 (1993). A claim of municipal liability
 5 under §1983 is sufficient to withstand a motion to dismiss ‘even if the claim is based on nothing
 6 more than a bare allegation that the individual officers’ conduct conformed to official policy,
 7 custom, or practice.’” *Karim-Panahi v. L.A. Police Dep’t.*, 839 F.2d 621, 624 (9th Cir. 1988),
 8 quoting *Shah v. County of Los Angeles*, 797 F.2d 743, 747 (9th Cir. 1986). “[I]t is enough if the
 9 custom or policy can be inferred from the allegations of the complaint.” *Shaw v. Cal. Dep’t of*
 10 *Alcoholic Beverage Control*; 788 F.2d 600, 610 (9th Cir. 1986).

11 Plaintiffs’ Fifth Claim for Relief sets forth factual allegations establishing WCSD’s liability
 12 as a result of: (1) a policy of inaction; and/or (2) a choice among alternatives by a municipal
 13 official with final decision-making authority; and/or (3) ratification a Defendant having “final
 14 policy-making authority;” FAC, ¶¶ 13, 25-35, 59, 60, 80-86, 88, 93-100, 112-115, 122, 199-200,
 15 205, 207, 228-223.

16 Defendants assert FAC, ¶ 201 alleges “there is *no* ‘comprehensive dress code’ policy.”
 17 Motion, 12:9-11. Paragraph 201 does not make this allegation. Moreover, Defendants confuse
 18 the word “policy” as used in the phrase “a policy of inaction,” with the word “policy” as used in
 19 the phrase “comprehensive dress code policy.” The words have absolutely different meanings
 20 under the two phrases. The “long-standing practice or custom” is not, as asserted by Defendants,
 21 Motion, 6:14-16, confined to the specific conduct which gives rise to Plaintiffs’ claim. Rather, it
 22 embraces a custom or practice which can be “inferred from widespread practices or ‘evidence of
 23 repeated constitutional violations for which the errant municipal officers were not discharged or
 24 reprimanded.’” *Nadell v. Las Vegas Metro. Police Dep’t*, 268 F.3d 924, 929 (9th Cir. 2001),
 25 quoting *Gillette v. Delmore*, 979 F.2d 1342, 1349 (9th Cir. 1992), abrogated on other grounds as
 26 recognized in *Beck v. City of Upland*, 527 F.3d 853, 862 n.8 (9th Cir. 2008).

27 Thus, in the present case, if Plaintiffs’ allegations are taken as true, then WCSD could be
 28 held liable for monetary damages, injunctive and declaratory relief. Plaintiffs assert there Fifth

1 Claim for Relief adequately sets forth factual allegations that plausibly give rise to liability.

2 Even if WCSD was the final policy-making authority, as Defendants contend, Motion,
3 6:19-21, this does nothing to insulate it from liability since the board endorsed and ratified the
4 unauthorized conduct on June 28, 2011. FAC, ¶ 100.

5 **F. SIXTH CLAIM FOR RELIEF**

6 Plaintiffs Sixth Claim for Relief establishes WCSD's liability by demonstrating the
7 constitutional violations were caused by a failure to train municipal employees adequately. *See*
8 *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388-91 (1989); *Price v. Sery*, 513 F.3d 962, 973
9 (9th Cir. 2008). Defendants insist the allegations of Plaintiffs' Sixth Claim for Relief are "very
10 generic" and "pointless" because it fails to identify the training supervisor and the type and
11 content of the training. Motion, 13:21-26.

12 On the contrary, Plaintiffs' Claim states that WCSD failed to train the Principal, the Area
13 Superintendent and the Superintendent and WCSD ignored the problem of which it was aware.
14 FAC, ¶¶ 214-216. In *Board of County Commissioners v. Brown*, 520 U.S. 397, 117 S.Ct. 1382,
15 137 L.Ed.2d 626 (1997), the Supreme Court discussed the circumstances under which inadequate
16 training can be the basis for municipal liability. The first is a deficient training program, "intended
17 to apply over time to multiple employees." *Id.* at 407, 117 S.Ct. 1382 (citation omitted). The
18 continued adherence by policymakers "to an approach that they know or should know has failed
19 to prevent tortious conduct by employees may establish the conscious disregard for the
20 consequences of their action--the 'deliberate indifference'—necessary to trigger municipal
21 liability." *Id.* (citation omitted). Further, "the existence of a pattern of tortious conduct by
22 inadequately trained employees may tend to show that the lack of proper training, rather than a
23 one-time negligent administration of the program or factors peculiar to the officer involved in a
24 particular incident, is the 'moving force' behind the plaintiff's injury." *Id.* at 407-08, 117 S.Ct.
25 1382 (citation omitted).

26 Plaintiffs could also succeed in proving a failure-to-train claim without showing a pattern
27 of constitutional violations where "a violation of federal rights may be a highly predictable
28 consequence of a failure to equip [the employee] with specific tools to handle recurring

1 situations.” *Id.* at 409, 117 S.Ct. 1382. The *Brown* Court explained:

2 The likelihood that the situation will recur and the predictability
3 that an [employee] lacking specific tools to handle that situation
4 will violate citizens' rights could justify a finding that policymakers'
5 decision not to train the [employee] reflected “deliberate
6 indifference” to the obvious consequence of the policymakers'
7 choice—namely, a violation of a specific constitutional or statutory
8 right.

6 *Id.*

7 The allegations set forth in Plaintiffs’ FAC, as a whole, rise to the level of a plausible claim
8 beyond mere speculation for WCSD’s failure to train its employees. Defendants’ Motion does
9 not reveal any deficiencies in Plaintiffs’ Sixth Claim for Relief and therefore it should be denied.

10 **G. SEVENTH CLAIM FOR RELIEF**

11 The Equal Protection Clause of the Fourteenth Amendment commands that no state shall
12 deny to any person within its jurisdiction the equal protection of the laws. In other words, persons
13 similarly situated should be treated alike. *City of Cleburne v. Cleburne Living Center, Inc.*, 473
14 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

15 Plaintiffs’ Seventh Claim is clear and straightforward. Plaintiff students are students in the
16 Washoe County School District’s schools. With regard to all students in the WCSD’s schools,
17 that is, all those similarly situated in the WCSD’s schools, should be treated alike. This is
18 provided for by Federal law and co-extensively by state law. NRS 388.070. Plaintiff students are
19 not treated like all other students in the WCSD because they are compelled to speak the message
20 of Roy Gomm One Team, One Community, Tomorrow’s Leaders, and are unconstitutionally
21 deprived of their free speech and expression rights. The factual allegations are facially plausible
22 and a reasonable inference can be drawn that Defendants are liable for the misconduct.
23 Defendants’ Motion should be denied.

24 **H. EIGHTH CLAIM FOR RELIEF**

25 Nevada Revised Statutes 393.071 and 393.0717 give the board of trustees the right to
26 grant the use of school buildings or grounds for public, literary, scientific, recreational or
27 educational meetings, or for the discussion of matters of general or public interest and charge the
28 board with the task of making all necessary regulations for the use of school buildings and

1 grounds such activities. In addition, WCSD's Community Engagement Policy, BOT-P1330 states
2 in pertinent part:

3 The school principal shall grant the use of school facilities for
4 worthwhile purposes provided that:

- 5 1. The use does not interfere with the school program.
- 6 2. The use is not for any private gain.
- 7 3. The use is not for closed (as distinguished from open) political
8 meetings.
- 9 4. The use is not for any program or movement which advocates
10 the overthrow of the government of the United States or any state
11 government.
- 12 5. The use is not for an illegal purpose.
- 13 6. The use complies with all regulations of this section.

14 WCSD's policy does not contain narrowly circumscribed guidelines, and in practice, almost any
15 group can rent school facilities as long as the insurance is paid. *Wallace v. Washoe County*
16 *School Dist.*, 818 F.Supp. 1346, 1350 (D. Nev., 1991)(construing similar provision). In addition,
17 WCSD opens Roy Gomm to various other organizations for use of its buildings⁵, including, but
18 not limited to, Brick 4 Kidz, Chess Kidz, the PFA, for various purposes, and routinely distributes
19 flyers and other informational documents to the students at Roy Gomm. Thus, WCSD has
20 created a designated open public forum at Roy Gomm. *Id.* at 1350-51; *Gregoire v. Centennial*
21 *School Dist.*, 907 F.2d 1366, 1370 (3rd Cir. 1990). In such a case, a content-based prohibition
22 must be narrowly drawn to effectuate a compelling state interest. *Perry Education Ass'n. v.*
23 *Perry Local Educators' Ass'n.*, 460 U.S. 37, 47, 103 S.Ct. 948, 956 (1983).

24 A designated public forum is government property "open[ed] for indiscriminate public use
25 for communicative purposes." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S.
26 384, 392 (1993). Speech in a designated public forum has significantly greater protection than
27 speech in a limited public forum—restrictions on speech in a designated public forum are subject
28 to strict scrutiny and, therefore, "must be narrowly tailored to serve a compelling government
interest." *Christian Legal Soc'y*, 130 S. Ct. 2971, 2984 n.11 (2010), quoting *Pleasant Grove*
City v. Summum, 555 U.S. 460, 129 S. Ct. 1125, 1132 (2009).

⁵Plaintiffs admit they do not at this time possess sufficient information to allege facts which would show that WCSD opened its "supplies, copy machines, computers, school staff and faculty members" to any organizations other than the PFA. The same cannot be said of its buildings and distribution of informational materials and flyers.

Defendants assert Plaintiffs' Eighth Claim for Relief for Denial of Equal Access to a Public Forum should be dismissed because it is "devoid of allegations that they were subjected to any First Amendment violation." Motion, 17:14-15. Contrary to this assertion, Plaintiffs' FAC contains the necessary factual allegations sufficient to establish this Claim. See FAC, ¶¶ 56-60, 64, allegations overlooked by Defendants in their Motion. Motion, 17:1,5,6, 11 and 13. Those allegations, if taken as true, show that Plaintiffs were denied the opportunity to present views opposing mandatory uniforms, including, but not limited to, views regarding the validity, legality and constitutionality of a mandatory uniform policy, the inefficacy of uniforms, and the lack of authority by the PFA, the Uniform Committee and Defendant Pilling to implement such a policy. *Id.*

Because Plaintiffs' Eighth Claim contain sufficient factual assertions, which if taken as true, allows the court to draw the reasonable inference that Defendants are liable for the misconduct alleged, Defendants' Motion on this Claim must be denied.

I. NINTH CLAIM FOR RELIEF

Defendants seek dismissal of Plaintiffs' Ninth Claim for Relief, based upon a violation of NRS 392.4644, because the statute does not provide for a private right of action.

Even, assuming *arguendo*, the statute does not provide for a private right of action, Plaintiffs' claims should not automatically be dismissed. Under the liberal rules of federal practice, dismissal under Federal Rule of Civil Procedure 12(b)(6) is proper "only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.2001). A plaintiff's "complaint is not to be dismissed because the plaintiffs lawyer has misconceived the proper legal theory of the claim, but is sufficient if it, shows that the plaintiff is entitled to any relief which the court can grant, regardless of whether it asks for the proper relief." *United States v. Howell*, 318 F.2d 162, 166 (9th Cir.1963).

Plaintiffs Ninth Claim sufficiently states a cause of action on which relief could be granted. Although the Claim makes reference to provisions in NRS 392.4644 which do not provide for private rights of action, a common law claim is also asserted, similar to that stated in Plaintiffs'

1 Eleventh Claim for Relief and accordingly, this claims presents a cognizable legal theory. The
 2 statute is by no means irrelevant just because it does not provide for a private right of action.
 3 Courts frequently look to statutes to determine appropriate standards of conduct.

4 Moreover, when a violation of state law causes the deprivation of a right protected by the
 5 United States Constitution, that violation may form the basis for a Section 1983 action. *Hallstrom*
 6 *v. City of Garden City*, 991 F.2d 1473, 1482, n. 22 (9th Cir. 1993)(holding that the violation of a
 7 state law requiring a post-arrest hearing before a magistrate judge constituted a cause of action
 8 under Section 1983), cert. denied, 510 U.S. 991, 114 S.Ct. 549, 126 L.Ed.2d 450 (1993).

9 Finally, a state may create a protected property or liberty interest by placing substantive
 10 limitations on official discretion with "particularized standards" or "objective and defined criteria."
 11 *Olim v. Wakinekona*, 461 U.S. 238, 249, 103 S.Ct. 1741, 1747, 75 L.Ed.2d 813 (1983), quoting
 12 *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 467, 101 S.Ct. 2460, 2466, 69
 13 L.Ed.2d 158 (1981) (Brennan, J., concurring). In order to create a protected interest the State
 14 must use "language of an unmistakably mandatory character, requiring that certain procedures
 15 'shall,' 'will,' or 'must' be employed." *Hewitt v. Helms*, 459 U.S. 460, 471-72, 103 S.Ct. at 871
 16 (1983).

17 A state creates a liberty interest by both (1) establishing 'substantive predicates to govern
 18 official decisionmaking,' and (2) using 'explicitly mandatory language, i.e., specific directives to
 19 the decisionmaker that if the regulations' substantive predicates are present, a particular outcome
 20 must follow.'" *Smith*, 994 F.2d at 1405, quoting *Thompson*, 490 U.S. at 462-63, 109 S.Ct. at
 21 1909-10.

22 "A person's liberty is equally protected, even when the liberty itself is a statutory creation
 23 of the State. The touchstone of due process is protection of the individual against arbitrary action
 24 of government." *Wolff*, 418 U.S. at 558, 94 S.Ct. at 2975, citing, *Dent v. West Virginia*, 129 U.S.
 25 114, 123, 9 S.Ct. 231, 233, 32 L.Ed. 623 (1889).

26 J. TENTH CLAIM FOR RELIEF

27 Plaintiffs' Tenth Claim for Relief is premised upon violations of Nevada's Open Meeting
 28 Law, NRS 241.010 *et seq.* FAC, ¶7; *see also* ¶273.

1 Defendants move to dismiss the Claim asserting it is not a legally cognizable claim because
 2 the Uniform Committee did not advise the school board "*at the board's request*" and because the
 3 Claim is time barred. Motion, 21:9-22:17 [emphasis in Motion]. Defendants are wrong on both
 4 counts. Addressing the second contention first, Plaintiffs' Complaint clearly sets forth facts which
 5 show conduct which could be considered "action," as that term is defined by NRS 241.015(1)(a),
 6 which occurred no earlier than May 8, 2011 and as late as June 28, 2011. Plaintiffs claim the
 7 Uniform Committee took "action" when it promulgated the Written Uniform Policy, which took
 8 place at one or more meetings held at Roy Gomm Elementary School between May 8, 2011 and
 9 May 31, 2011. FAC, ¶¶ 90, 274, 302. In addition, on June 28, 2011, the WCSD thereafter
 10 "considered matters voiced" in Mary Frudden's June 6, 2011 letter and permitted Roy Gomm
 11 Elementary School to "mov[e] forward with the implementation of uniforms for the 2011-2012
 12 school year." FAC, ¶¶ 95-100. Plaintiffs' original Complaint was filed on July 6, 2011. Thus,
 13 Plaintiffs' Tenth Claim for Relief is clearly not time-barred.

14 As to their first contention, Defendants cite to no authority for their proposition that an
 15 advisory board must advise at the request of a public body. Motion, 21:10-17. Nothing in the
 16 Open Meeting Law requires "action" to be performed at the request of a public body. On the
 17 contrary, "action" is defined as "[a] decision made by a majority of the members present during a
 18 meeting of a public body." NRS 241.015(1)(a). The Nevada Attorney General has opined:

19 Formality in appointment does not seem to be a dispositive factor in
 20 the statutory definition, and we believe that informality should not
 21 be an escape from it. To hold otherwise is to encourage
 22 circumvention of the Open Meeting Law through the use of
 23 unofficial committees.

24 Nev.Att.Gen, OMLO 98-04 (July 7, 1998)(Informal "brainstorming" sessions undertaken by two
 25 members of WCSD board of trustees on their own accord still considered meeting of a public
 26 body). A "public body" is:

27 any administrative, advisory, executive or legislative body of the
 28 State or a local government which expends or disburses or is
 supported in whole or in part by tax revenue or which advises or
 makes recommendations to any entity which expends or disburses
 or is supported in whole or in part by tax revenue, including, but
 not limited to, any board, commission, committee, subcommittee or
 other subsidiary thereof

1 NRS 241(3)(a).

2 Defendants' reliance on NRS 392.458 is of no consequence with regard to violations of
 3 the Open Meeting Law for several reasons. First, as evidenced by the letter dated June 28, 2011
 4 from Defendant Rauh, an Area Superintendent for the WCSD, the WCSD board of trustees took
 5 "action" on or about June 28, 2011 when it endorsed and ratified Roy Gomm's implementation of
 6 uniforms for the 2011-2012 school year (which necessarily included the Written Uniform Policy).
 7 FAC, ¶ 100. This matter was never made part of any notice or agenda of the WCSD's board of
 8 trustees and was not determined in accordance with the Open Meeting Law. Thus, the board's
 9 endorsement and ratification of the Written Uniform Policy is "action" which was taken by the
 10 board of trustees. It is void pursuant to NRS 241.036. *See* Nev.Att.Gen. OMLO 98-03 (July 7,
 11 1998)(Warning WCSD Board of Trustees to consider or take action only on items that are clearly
 12 listed on its meeting agendas, to assure that its minutes reflect the substance of all matters
 13 discussed or decided, and to assure that all of its committees and subcommittees comply with the
 14 Open Meeting Law, or the office would take legal action).

15 Second, if the Written Uniform Policy is valid and enforceable, it is difficult to see how the
 16 Uniform Committee can be considered anything other than a "public body" taking "action" where
 17 it has performed the very function expressly granted to the school districts' board of trustees
 18 pursuant to NRS 392.458 (ie. establishing a policy that requires pupils to wear school uniforms)
 19 and where the WCSD board of trustees endorsed and ratified that action. The Nevada Attorney
 20 General stated it clearly:

21 It would be incongruous to argue that it is not really a "committee,
 22 subcommittee or subsidiary" of the Board under the Open Meeting
 23 Law because of the lack of formality in appointment. Otherwise,
 24 public bodies would be encouraged to break up into little unofficial
 25 groups and do business in the shadows, stepping into the sunshine
 to perfunctorily approve what has already been decided, which
 would be completely contrary to the intent expressed in NRS
 241.010 that public bodies take their actions and conduct their
 deliberations in the open.

26 Nev.Att.Gen., OMLO 98-03 (July 7, 1998)(A subcommittee informally appointed by the
 27 president of WCSD's board of trustees was a public body as defined in NRS 241.015(3) where,
 28 even though the subcommittee was not formally appointed, its members shared equal voting

1 power, formed a consensus to speak to the school board with one voice, and the school board
2 knew of its existence and treated it as a board subcommittee).

3 Third, the mandates set forth in NRS 386.365 (required before adopting, repealing or
4 amending a policy or regulation of the board concerning pupil discipline) foreclose any attempt by
5 the board of trustees (or anyone acting on its behalf) to establish a policy requiring students to
6 wear uniforms where, as here, such policy includes progressive disciplinary action against a
7 student for violation of the mandatory uniform policy, **without complying with the Open**
8 **Meeting Law**. See Nev.Att.Gen., OMLO 2006-07(a meeting held pursuant to NRS 386.365 by a
9 board of trustees to adopt, repeal or amend board policies or regulations must also comply with
10 the Open Meeting Law because it meets the elements of the definition of a "Meeting" found in
11 NRS 241.015(2)(a)(1)).

12 The Legislature has declared that "all public bodies exist to aid in the conduct of the
13 people's business. It is the intent of the law that their actions be taken openly and that their
14 deliberations be conducted openly." This case presents the very concerns the Open Meeting Law
15 is designed to protect. Plaintiffs' Tenth Claim is not time-barred and sufficiently sets forth a
16 legally cognizable claim against the Uniform Committee and the WCSD board of trustees.

17 **K. ELEVENTH CLAIM FOR RELIEF**

18 Defendants' argument overlooks relevant Nevada statutes, which, in combination with the
19 constructs of Nevada case law provide an overwhelming basis on which to deny Defendants'
20 Motion on this Breach of Special Relationship Claim.

21 Under Nevada law, "[a] fiduciary relationship is deemed to exist when one party is bound
22 to act for the benefit of the other party. Such a relationship imposes a duty of utmost good faith."
23 *Hoopes v. Hammargren*, 102 Nev. 425, 725 P.2d 238, 242 (1986). "The essence of a fiduciary or
24 confidential relationship is that the parties do not deal on equal terms, since the person in whom
25 trust and confidence is reposed and who accepts that trust and confidence is in a superior position
26 to exert unique influence over the dependent party." *Id.* [internal quotation marks and citation
27 omitted].

28 In Nevada, the existence of a "special relationship" imposes a duty to disclose. Under

1 these circumstances, “[n]ondisclosure . . . become[s] the equivalent of fraudulent concealment.”
 2 *Mackintosh v. Jack Matthews & Co.*, 109 Nev. 628, 855 P.2d 549, 553 (1993). In order to prove
 3 the existence of a special relationship, a party must show that (1) “the conditions would cause a
 4 reasonable person to impart special confidence” and (2) the trusted party reasonably should have
 5 known of that confidence. *Mackintosh v. Cal. Fed. Sav. & Loan Ass’n*, 113 Nev. 393, 935 P.2d
 6 1154, 1160 (1997) (per curiam).

7 In the present case, the fiduciary/special relationship between Plaintiff students and
 8 Defendants Pilling, Rauh and Morrison is expressly provided for in the educational involvement
 9 accord required to be utilized by public schools in Nevada. As stated therein, the responsibilities
 10 of a public school and the administrators, teachers and other personnel employed at a school,
 11 include, without limitation: (1) Ensuring that each pupil is provided proper instruction,
 12 supervision and interaction; (2) Maximizing the educational and social experience of each pupil;
 13 and (3) Carrying out the professional responsibility of educators to seek the best interest of each
 14 pupil. NRS 392.4575(2)(c).

15 Likewise, the fiduciary/special relationship between Plaintiff parents and Defendants
 16 Pilling, Rauh and Morrison, is also set forth in the educational involvement accord, which
 17 provides for the “[i]nclusion of parents as full partners in decisions affecting their children and
 18 families.” NRS 392.4575(1)(b) and 392.457(2)(e). The fiduciary duty that partners owe one
 19 another has been described as follows:

20 The fiduciary duty among partners is generally one of full and frank
 21 disclosure of all relevant information for just, equitable and open
 22 dealings at full value and consideration. Each partner has a right to
 23 know all that the others know, and each is required to make full
 24 disclosure of all material facts within his knowledge in anything
 relating to the partnership affairs. The requirement of full disclosure
 among partners in partnership business cannot be escaped.... Each
 partner must ... not deceive another partner by concealment of
 material facts.

25 59(A) Am.Jur.2d Partnership § 425 (1987). In addition, a partner's motives or intent do not
 26 determine whether his actions violate his fiduciary duty. *Id.* at § 423.

27 Plaintiffs assert Defendants owed them the fiduciary duty to maximize their education and
 28 social experience and to carry out their professional responsibility as educators to seek the best

1 interest of each student as well as the fiduciary duty of full disclosure of material facts relating to
 2 decisions affecting them. Because the duties imposed upon Defendants are of a fiduciary and
 3 special nature, the cases cited by Defendants regarding confidential relationships not rising to level
 4 of fiduciary relationships, Motion, 23:4-24:9 are inapposite. Plaintiffs' Eleventh Claim should not
 5 be dismissed pursuant to Fed.R.Civ.P. 12(b)(6).

6 **L. TWELFTH CLAIM FOR RELIEF**

7 Plaintiffs' Twelfth Claim centers around the false and inaccurate statements and omissions
 8 made by Defendants Pilling, Rauh and Morrison between May 18, 2010 and at least June 8, 2011.
 9 Defendants' objection to the use of the terms "Roy Gomm parents and students" notwithstanding,
 10 Motion, 25:12-16, it has been alleged that Plaintiffs are parents of students attending Roy Gomm
 11 and thus such phrase easily applies to Plaintiffs. FAC, ¶¶ 4-5. In addition, the FAC clearly asserts
 12 the falsity of the representations (and/or omissions) attributed to each of the foregoing
 13 Defendants. FAC, ¶ 306. Plaintiffs' Claim has been plead with the particularity required by
 14 Fed.R.Civ.P. 9(b). The Claim identifies the time, place and content of the alleged
 15 misrepresentation; it explains why the alleged statement(s) were false when made; and asserts that
 16 the certain Defendants made the false representation (or omissions) with the intent to induce
 17 Plaintiffs to act. The particular factual allegations, if taken as true, allow the court to draw the
 18 reasonable inference that Defendants are liable for the misconduct alleged and thus the Claim
 19 withstands Defendants' Motion to Dismiss.

20 **M. THIRTEENTH CLAIM FOR RELIEF**

21 The purpose of the Nevada Public Records Act, NRS Chapter 239, is to ensure the
 22 accountability of the government to the public by facilitating public access to vital information
 23 about governmental activities. *DR Partners v. Bd. of County Comm'rs*, 6 P.3d 465, 469, 116
 24 Nev. 616 (Nev., 2000). As alleged in the FAC, Plaintiffs were denied public records when they
 25 were not afforded the right to view the ballots. FAC, ¶¶ 68, 77. While records may be compelled
 26 via a writ of mandamus, nothing in the Act prohibits an action for damages. Although a private
 27 right of action is not expressly provided for in the Nevada Public Records Act, one can be implied
 28 because only "[a] public officer or employee who acts in good faith in disclosing or refusing to

1 disclose information and the employer of the public officer or employee are immune from liability
 2 for damages, either to the requester or to the person whom the information concerns.” 239.012.
 3 Plaintiffs Thirteenth Claim sufficiently sets forth allegations, which, if taken as true, entitle them to
 4 relief.

5 **N. FOURTEENTH CLAIM FOR RELIEF**

6 Plaintiffs acknowledge a claim for attorney’s fees is dependent upon success of Plaintiffs’
 7 claims. Nevertheless, Plaintiffs’ claims should not be dismissed until fees are no longer available.

8 **O. FIFTEENTH AND SIXTEENTH CLAIMS FOR RELIEF**

9 Defendants assert Plaintiffs’ Fifteenth and Sixteenth Claims should be dismissed because
 10 injunctive and declaratory relief are remedies and not causes of action. Motion, 28:12-13. The
 11 cases cited by Defendants are inapposite.

12 In *Gillespie v. Countrywide Bank FSB*, case no. 3:09-cv-556-JCM-VPC at p. 5 (D.Nev.
 13 August 19, 2011), although the Court did state these were remedies, the Court’s dismissal of
 14 these claims was only made after determining all other claims—plaintiff’s entire Complaint—failed
 15 to state claims upon which relief could be granted.

16 In *Stock West, Inc. v. Confederated Tribes of Colville Reservations*, the Plaintiff’s
 17 Complaint asserted subject matter jurisdiction was based upon the Declaratory Judgment Act, 28
 18 U.S.C. 2201. The Court determined there must be an independent basis for jurisdiction in order
 19 to obtain declaratory relief in federal court. In the present case, Plaintiffs have asserted
 20 jurisdiction based upon 28 U.S.C. §§ 1331 and 1367. Complaint, 2:9-11. Defendants did not
 21 contend the Court lacks subject matter jurisdiction.

22 Finally, in *In re Wal-Mart Wage & Hour Employment Practices Litig.*, 490 F.Supp.2d
 23 1091, 1130 (D.Nev. 2007) the Court expressly found:

24 Although denominated as a separate claim, count nine is not a
 25 separate cause of action but a request for injunctive relief. The
 26 Court will not foreclose the remedy of injunctive relief at this stage
 of the proceedings. The Court therefore will deny Defendants’
 motion to dismiss count nine with the understanding that count nine
 is not an independent ground for relief.

27 Both of these claims are derivative of Plaintiffs’ other substantive
 28 claims, which all fail. Accordingly, Plaintiffs’ third and fourth claims
 for relief must also be dismissed.

1 Nothing in the authorities provided by Defendants supports a dismissal of requests for
 2 declaratory and injunctive relief merely because they do not constitute separate "claims." Where,
 3 as here, Plaintiffs' FAC contains viable claims which would entitle them to either declaratory or
 4 injunctive relief, or both, the "claims" should not be dismissed.

5 P. QUALIFIED IMMUNITY

6 Defendants are not entitled to qualified immunity. "The proponent of a claim to absolute
 7 immunity bears the burden of establishing the justification for such immunity." *Antoine v. Byers &*
 8 *Anderson, Inc.*, 508 U.S. 429, 432 (1993); *see also Buckley v. Fitzsimmons*, 509 U.S. 259, 269
 9 (1993); *Goldstein v. City of Long Beach*, 481 F.3d 1170, 1173 (9th Cir. 2007), cert. granted, 128
 10 S. Ct. 1872 (U.S. Apr. 14, 2008) (No. 07-854); *Botello v. Gammick*, 413 F.3d 971, 976 (9th Cir.
 11 2005); *Genzler v. Longanbach*, 410 F.3d 630, 636 (9th Cir. 2005). Qualified immunity is only an
 12 immunity from suit for damages, it is not an immunity from suit for declaratory or injunctive
 13 relief. *See Hydrick v. Hunter*, 500 F.3d 978, 988 (9th Cir. 2007), petition for cert. filed, 76
 14 U.S.L.W. 3410 (U.S. Jan. 17, 2008) (No. 07-958); *L.A. Police Protective League v. Gates*, 995
 15 F.2d 1469, 1472 (9th Cir. 1993); *Am. Fire, Theft & Collision Managers, Inc. v. Gillespie*, 932
 16 F.2d 816, 818 (9th Cir. 1991).

17 Qualified immunity is not available where the government actor was not performing a
 18 discretionary function. *Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986), cert.
 19 *denied*, *Duffy v. Ward*, 483 U.S. 1020 (1987). The discretionary function exception will not
 20 apply when a statute, regulation, or policy specifically prescribes a course of action for an
 21 employee to follow. The statutory directive must be adhered. *Berkovitz v. United States*, 486
 22 U.S. 531, 108 S.Ct. 1954, 100 L.Ed.2d 531, 536 (1988).

23 In addition, where an officer's actions are "attributable to bad faith, immunity does not
 24 apply whether an act is discretionary or not." *Falline v. GNLV Corp.*, 107 Nev. 1004, 1009, 823
 25 P.2d 888 (Nev.1991); *see also Jordan v. State Dep't of Motor Vehicles*, 121 Nev. 44, 49 n. 66,
 26 110 P.3d 30 (Nev.2005). NRS 41.032(2) provides immunity to contractors, officers, employees,
 27 agents and political subdivisions of the State for the performance or non-performance of
 28 discretionary acts whether or not the discretion involved is abused.

1 However, an abuse of discretion necessarily involves at least two
 2 factors: (1) the authority to exercise judgment or discretion in
 3 acting or refusing to act on a given matter; and (2) a lack of
 4 justification for the act or inaction decided upon. Bad faith, on the
 5 other hand, involves an implemented attitude that completely
 6 transcends the circumference of authority granted the individual or
 7 entity. In other words, an abuse of discretion occurs within the
 8 circumference of authority, and an act or omission of bad faith
 occurs outside the circumference of authority. Stated otherwise, an
 abuse of discretion is characterized by an application of
 unreasonable judgment to a decision that is within the actor's
 rightful prerogatives, whereas an act of bad faith has no relationship
 to a rightful prerogative even if the result is ostensibly within the
 actor's ambit of authority.

9 *Falline*, 107 Nev. at 1009 n. 3, 823 P.2d 888.

10 Government officials do not enjoy qualified immunity from civil damages where their
 11 conduct violates "clearly established statutory or constitutional rights of which a reasonable
 12 person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73
 13 L.Ed.2d 396 (1982); *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir.1991). "A public
 14 official is not entitled to qualified immunity when the contours of the allegedly violated right were
 15 sufficiently clear that a reasonable official would understand that what he [was] doing violate[d]
 16 that right." *Osolinski v. Kane*, 92 F.3d 934, 936 (9th Cir.1996) (alterations in original) (citations
 17 omitted).

18 Determining whether a public official is entitled to qualified immunity "requires a two-part
 19 inquiry: (1) Was the law governing the state official's conduct clearly established? (2) Under that
 20 law could a reasonable state official have believed his conduct was lawful?" *Browning v. Vernon*,
 21 44 F.3d 818, 822 (9th Cir.1995), citing *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871-72 (9th
 22 Cir.1993). "The plaintiff need not show the specific action at issue has been previously held
 23 unlawful, he need only show that the alleged unlawfulness was apparent in light of preexisting
 24 law." See *Seamons v. Snow*, 84 F.3d 1226, 1237 (10th Cir.1996), quoting *Hilliard v. City and*
 25 *County of Denver*, 930 F.2d 1516, 1518 (10th Cir.), cert. denied, 502 U.S. 1013, 112 S.Ct. 656
 26 (1991).

27 In *Tinker, supra*, the Supreme Court clearly established that students in public schools
 28 have the right to freedom of speech and expression. *Tinker*, 393 U.S. at 506, 89 S.Ct. at 736.

1 This is a broad right that would encompass the Plaintiff students' rights.

2 *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178 (1943)
3 clearly established that it is unconstitutional compelled speech to require students to salute the
4 Flag and recite the Pledge of Allegiance for the "purpose of teaching, fostering and perpetuating
5 the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization
6 and machinery of the government."


7 Furthermore, *Jacobs v. Clark County School District*, 526 F.3d 419 (9th Cir. 2008) makes
8 clear that the mid-scrutiny level established in *United States v. O'Brien*, 391 U.S. 367, 377, 88
9 S.Ct. 1673 [*reh'g denied*, 393 U.S. 900] (1968) does not apply to content or viewpoint based
10 regulations.

11 In this case, Defendants have not met their burden to show they are entitled to immunity.
12 They have not shown they were acting within their discretion and it remains to be determined
13 whether they were acting in bad faith. The laws regarding compelled speech, and viewpoint and
14 content-based restrictions on speech in the public school setting is clearly established. As such, a
15 reasonable school district employee could not have believed his or her conduct was lawful.

16 **III. CONCLUSION**

17 Based upon the foregoing, Defendants' Motion to Dismiss should be denied in its entirety.

18
19 Respectfully submitted this 23 day of November, 2011.

20
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On Behalf of Themselves and their Minor Children

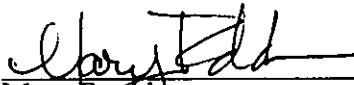
CERTIFICATE OF SERVICE

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I hereby certify that I hand-delivered a copy of the foregoing document to Defendants to the following:

MAUPIN, COX & LeGOY
4785 Caughlin Parkway
Reno, NV 89519

Dated this 23 day of November, 2011.



Mary Frudden